

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 30 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0376-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
GLEN ALAN HUGGINS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR-20050551

Honorable Robert Duber II, Judge

REVIEW GRANTED; RELIEF DENIED

Daisy Flores, Gila County Attorney
By Ramai L. Alvarez

Globe
Attorneys for Respondent

Law Office of Emily Danies
By Emily Danies

Tucson
Attorney for Petitioner

H O W A R D, Chief Judge.

¶1 After a jury trial, petitioner Glen Huggins was convicted of one count of possession of a dangerous drug and one count of possession of drug paraphernalia. The

trial court sentenced him to presumptive, concurrent prison terms, the longer of which was ten years, and this court affirmed Huggins's convictions and sentences on appeal. *State v. Huggins*, No. 2 CA-CR 2006-0389 (memorandum decision filed Oct. 16, 2007).

¶2 Subsequently, Huggins sought relief from the trial court pursuant to Rule 32, Ariz. R. Crim. P., raising a claim of ineffective assistance of trial counsel and also claiming that newly discovered evidence of juror bias entitled him to a new trial. The court found Huggins's juror-bias claim to be precluded and, after an evidentiary hearing, also denied relief on his claim of ineffective assistance of counsel. This petition for review followed. We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of the court's discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

Ineffective Assistance of Counsel

¶3 Huggins first contends trial counsel was ineffective because he failed to adequately explain the advantages of pleading guilty rather than proceeding to trial. Had he been fully informed, Huggins contends, he would have accepted a plea agreement the state had offered him. A "defendant has a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or reject" a plea offer. *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000).¹

¹Because we uphold the trial court's finding that Huggins did not receive ineffective assistance, we need not determine whether *Donald* was correctly decided. See *State v. Vallejo*, 215 Ariz. 193, ¶ 10, n.4, 158 P.3d 916, 919 & n.4 (App. 2007) (Howard, J., specially concurring).

¶4 To be entitled to post-conviction relief based on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient in that it fell below prevailing professional norms and also that this deficient performance was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the court need not determine whether the other prong was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). In determining whether an attorney's performance was deficient, this court generally defers to the trial court's factual findings and assessment of the credibility of witnesses. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993); *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988).

¶5 At an evidentiary hearing on the issue of whether Huggins had been fully informed of the implications of proceeding to trial, the trial court heard testimony from three witnesses—Huggins, his mother, and his trial counsel. Huggins and his mother both testified that counsel had not informed Huggins of the implications of going to trial, while counsel stated that he had. In resolving this conflict in the evidence, the court concluded that trial counsel's testimony was more credible than Huggins's or his mother's and therefore determined Huggins had not received ineffective assistance of counsel.

¶6 The trial court's findings here rested upon its assessment of the credibility of the three witnesses who testified at the evidentiary hearing. And it was for the court alone to resolve any conflicts in the witnesses' testimony. *See Fritz*, 157 Ariz. at 141,

755 P.2d at 446 (trial court sole arbiter of witness credibility in post-conviction proceedings). Based on that resolution, Huggins has not shown trial counsel's performance fell below prevailing professional norms. Accordingly, we need not examine whether the performance prejudiced him. *See Salazar*, 146 Ariz. at 541, 707 P.2d at 945. The court did not abuse its discretion in denying relief on this claim.

Newly Discovered Evidence of Juror Bias

¶7 Huggins also argues the trial court erred in concluding that his claim of newly discovered evidence of juror bias was precluded pursuant to Rule 32.2(a)(3). That rule states that a defendant is precluded from post-conviction relief “based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.”

¶8 Two weeks after he was sentenced, Huggins moved for a new trial based on newly discovered evidence that a juror who had served on his case may have known him and been biased against him. The court refused to rule on Huggins's motion, concluding that it was “without jurisdiction to address the motion” because Huggins had filed his notice of appeal on the same day as his motion for new trial, thereby divesting the court of jurisdiction. Huggins again raised his claim of juror bias in his petition for post-conviction relief, and the court denied it, finding the claim was precluded because Huggins should have raised it on appeal or sought “a stay of the appeal to develop the record.”

¶9 The timing of Huggins's motion for new trial implies he did not discover the alleged juror bias until nearly two weeks after he was sentenced. Rule 32 does not

require that a petitioner request a stay of appeal in order to develop a record on newly discovered evidence. And the court did not find any lack of diligence on Huggins's part. Finally, because it refused to rule on the merits of Huggins's motion, the court did not develop a record on the issue; without a ruling on his motion, Huggins could not have raised the issue on appeal. *See* A.R.S. § 13-4033(A); *State v. Smith*, 208 Ariz. 20, n.3, 90 P.3d 221, 223 n.3 (App. 2004) (court of appeals would not address issue "not addressed by the trial court" because it did not "possess an adequate record" on the issue); *cf. Stewart v. Mut. of Omaha Ins. Co.*, 169 Ariz. 99, 108, 817 P.2d 44, 53 (App. 1991) (appellate court will not consider argument not first ruled on by trial court). Thus, the court erred in finding Huggins's claim of juror bias precluded pursuant to Rule 32.2(a)(3).

¶10 Nevertheless, the trial court did not abuse its discretion in denying Huggins's claim for post-conviction relief. Despite having found his claim of newly discovered evidence of juror bias precluded, the court also noted that Huggins had failed to demonstrate a colorable claim of newly discovered evidence of juror bias for review. A petitioner presents a colorable claim for review, and is therefore entitled to an evidentiary hearing on a claim of newly discovered evidence, if he has "plausibly show[n]" that newly discovered facts "probably exist and . . . probably would have changed the verdict." *State v. Krum*, 183 Ariz. 288, 292-93, 903 P.2d 596, 600-01 (1995) (emphasis omitted). A claim of newly discovered evidence must, however, "consist of more than conclusory assertions," *Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201, and

mere “[s]peculation as to juror bias is insufficient to establish that [a] defendant was denied a fair trial,” *State v. Soule*, 164 Ariz. 165, 169, 791 P.2d 1048, 1052 (App. 1989).

¶11 Huggins submitted several signed statements in support of his claim of newly discovered evidence of juror bias. But the statements are substantively inadequate to support the claim because they do not allege any personal knowledge of the alleged bias and are therefore impermissibly speculative and conclusory. *See id.* Additionally, only Huggins’s statement was notarized, so the other two also are procedurally inadequate to support Huggins’s petition. *See* Ariz. R. Crim. P. 32.5 (petition for post-conviction relief must be supported by “[a]ffidavits . . . currently available to the defendant supporting the allegations of the petition”). Accordingly, the court did not abuse its discretion in summarily denying Huggins’s claim of newly discovered evidence of juror bias.

Conclusion

¶12 For the foregoing reasons, we grant review but deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge